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No. 339

In the

Supreme Court of the United States

OCTOBER TERM, 1955

JOE GIBSON,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Report of the Opinion of the Court Below	2
Grounds on Which Jurisdiction Is Invoked	2
Questions Presented	2
Statutes and Constitutional Provision Involved	3
Statement	3-8
Reasons for Granting the Writ	8
1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas	8-9
2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution	9-10
3. The questions here presented have great importance and far reaching effect	10-11
4. The decision of the Court of Appeals was clearly erroneous	12
Conclusion	12
Appendix A—Appeal from the United States District Court for the Western District of Texas	13
Appendix B—Judgment	25
Order Denying Hearing	26

Cases

	Page
Erie R. Co. v. Tompkins, 304 U. S. 64	9
Guaranty Trust Co. v. York, 320 U. S. 99	9
E. G. Ives v. Grand Trunk R. Co., 63 S. Ct. 1077, 319 U. S. 372	10
McKee General Contractor v. Patterson, 271 S. W. 2d 391	8
Russell v. Todd, 309 U. S. 280	9
Shulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608	10
Wichita Royalty Co. v. City National Bank, 306 U. S. 103	9

Statutes and Constitutional Provisions

Rules of Decision Act, 28 U. S. C. Section 1652	3, 9
Seventh Amendment to the Constitution	3

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Joe Gibson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 19, 1956 (Petition for Rehearing in the said cause having been denied on May 23, 1956).

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 367), printed in Appendix A hereto, infra, page 13, is reported in 232 Federal 2d 13.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 19, 1956. (R. 379; Appendix B, infra, page 25.) Rehearing was denied on May 23, 1956. (R. 404; Appendix B, page 26, infra.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may, in arriving at a decision on a case, under its appellate jurisdiction by virtue of diversity of citizenship of the parties, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as set forth by the highest court of the State?

2. Whether a Court of Appeals in an action under Federal jurisdiction by virtue of diversity of citizenship of the parties may disregard the jury's findings, which findings are supported by the evidence, and reverse the trial court's

judgment for the plaintiff, and render judgment for the defendant?

IV.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

Petitioner, Joe Gibson, brought this suit in the United States District Court for the Western District of Texas, Pecos Division, against Respondent, Phillips Petroleum Company, for damages for personal injuries sustained by

Joe Gibson based upon Respondent's failing to furnish Joe Gibson with a safe place to perform his work and in failing to warn Joe Gibson of the unsafe conditions existing. (R. 1-10.) The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Texas, and the defendant being a foreign corporation duly incorporated and organized under the laws of the State of Delaware. (R. 317-330.)

Mr. Cecil Parsons was rig superintendent for Phillips Petroleum Company. On one of the rigs under his supervision, Phillips wanted to convert a "mud house" into a "dog house." (R. 150.) In pursuance of this Parsons entered into a contract with one Grady Barrs to do such conversion work. (R. 150.) At that time Joe Gibson was in the employ of Mr. Barrs, and Mr. Barrs sent him out to do the conversion work. (R. 27.)

In connection with the making of the conversion contract, apparently nothing was said as to who was to furnish ladders or things upon which Barrs or his employees might have to stand. (R. 237.) However, even though Parsons testified that he did not know it would be necessary for the welders to stand on anything while working on the "dog house," he did know that in the course of the work that it would be necessary to have something to stand on and had talked about using oil barrels for this purpose. (R. 163.) Apparently Parsons contemplated using the oil barrels since he knew there was nothing in the "dog house" to stand on (R. 160) and there was nothing but barrels available for standing (R. 175).

Since Parsons knew that barrels would be used to stand on, he had the barrels which had contained gasoline and kerosene placed at one place on the location by the water tanks and had the oil barrels stacked between the dog house and the rig in order that the welders would get oil barrels to stand on rather than gasoline or kerosene barrels. (R. 156.) Parsons had this done because he had known of barrels blowing up before. (R. 157 and 162.) However, Mr. Barrs and his employees were not told which stack was which. (R. 174-175.)

Mr. T. J. Murray, Phillips' driller, testified that as a matter of practice whenever Mr. Barrs or one of his employees needed a barrel that Murray would go get it for him. (R. 175.)

In this connection Mr. Gibson testified that while converting the mud house that it was sometimes necessary to have something to stand on and that when it did become so necessary the Phillips people would provide something to stand on. (R. 32.) The first time that Joe Gibson was furnished a scaffold by Phillips was when a roughneck called "Red" got an oil barrel and set it up for him. At that time Mr. Gibson asked about the barrel's previous contents and the Phillips men told him that the barrels were water barrels. (R. 33.) Gibson continued to use these barrels during the conversion job, and when the rig and dog house were moved to another location, these barrels were moved by putting them in the dog house when the move was made. (R. 34 and 73.)

The day before he was injured Gibson worked on the dog house, and Phillips men worked with him. They furnished him a barrel to stand on at that time. (R. 36.) The roughneck by the name of "Red" furnished the barrel, which was a 55-gallon barrel and had the same appearance as the other ones upon which Gibson had worked. When Gibson left the job that day, the barrel that Gibson was using was left there by the dog house. (R. 36 and 37.)

On the morning of February 8, 1952, the day upon which Gibson was injured, he started to work cutting out some conduit pipe out of the top of the dog house in accordance with instructions given him by Mr. Parsons. The barrel that he had used the day before was available, being 3 or 4 feet from where he thought he had left it the day before, and he got it. (R. 38.) (Also R. 100-102.) Gibson had nothing at all to do with the selection of this barrel (R. 39) because the Phillips' boys handled the barrels and provided him with that barrel. (R. 114.) While Gibson was standing on this barrel using a cutting torch, the barrel exploded causing Gibson to sustain serious personal injuries. It later developed that the barrel's former content was kerosene.

In the stack of barrels which supposedly contained only oil drums there was at least one barrel which had contained kerosene, according to Phillips' roughneck, Red Koonz. (R. 303-304.) It was this stack that Parsons had intended to be used when it was necessary to obtain a barrel upon which the welders could stand. (R. 161.) According to Phillips' employees, all of the barrels looked alike including the one that exploded in that they were the same size, design and

color. (Parsons, R. 155-156; Murray, R. 169-173; Teakell, R. 293; Koonz, R. 313.) There was no marking on the barrel to warn Gibson of the contents of it. (R. 42.)

Further, according to Parsons (R. 155-156) and Koonz (R. 314-315), it was necessary to take the bungs out of the barrels and smell them before it could be determined what the contents had been. In addition Gibson testified that he could not have necessarily determined the contents of the barrel by smelling of it. (R. 104.)

It is true that Mr. Gibson knew that a barrel containing kerosene would be dangerous around a welding or cutting operation, but there was absolutely no showing that Mr Gibson knew that this barrel which exploded, which had been furnished by Appellant through its employees, contained such fumes and was thus dangerous nor was there anything about the drum which would raise any suspicion in his mind as to its former contents under the above described circumstances. Mr. Gibson testified that he had not been told of the contents nor was there any marking on the barrel which might reveal its former contents. (R. 42.) This was true even though Parsons was afraid that one of the welders might get hold of a kerosene barrel. (R. 292.)

Parsons testified that the whole premises including the supervision of the conversion job was his responsibility and under his supervision. Parsons did, in fact, check up on the welding job whenever he went on the location. (R. 270-271.)

Upon this and the other testimony adduced at the trial of this cause, together with the court's instructions, the jury

subsequently returned a verdict for Plaintiff assessing his damages at $40,000.00 (R. 317-330), and judgment was entered thereon (R. 355-358).

From the District Court's judgment Phillips Petroleum Company brought its appeal to the Court of Appeals for the Fifth Circuit, which Court disregarded the jury's findings to the effect that Phillips failed to furnish Joe Gibson with a safe place in which to do his work and that Joe Gibson was not contributorily negligent and rendered judgment for Phillips. (R. 379.)

VI.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The Court of Appeals correctly stated that the duty of the owner or occupier of land "does not extend to those invitees who know or should know of the existence of a particular condition, and who appreciate, or should appreciate its dangers." However, the Court of Appeals based its decision on its holding that a duty rested upon Gibson "to exercise his intelligence to the fullest extent and to make such use of his external senses in the interest of his own safety as is reasonable under the circumstances."

This is in direct conflict with the law of Texas as set forth by the Supreme Court of Texas in the recent case of *McKee General Contractor v. Patterson, 271 S. W. 2d 391,* which held that although an invitee is charged with knowl-

edge of those dangers which are open and obvious, that there is no obligation on the part of the invitee to inspect the premises in order to determine the existence of a dangerous condition. The Supreme Court of Texas further stated that "while he may not close his eyes to obvious dangers, he, (the invitee) has a right to assume that the premises are safe for his use."

Since the Court of Appeals did not follow the law of Texas, a typical situation is presented in which this Honorable Court has on a number of occasions granted Writs of Certiorari. *Erie R. Co. v. Tompkins, 304 U. S. 64; Russell v. Todd, 309 U. S. 280; Wichita Royalty Co. v. City National Bank, 306 U. S. 103; Guaranty Trust Co. v. York, 320 U. S. 99.* See also *Rules of Decision Act, U. S. C., Section 1652.*

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

As set forth in the statement hereof, the evidence clearly raised the issue of whether or not Phillips Petroleum Company failed to furnish Joe Gibson a reasonably safe place in which to do his work, from which evidence the jury was more than justified in making a finding favorable to Joe Gibson and was further justified in finding that Joe Gibson was not guilty of contributory negligence.

Although giving lip service to the general rule that the evidence must be viewed in the light most favorable to Gibson, the Court of Civil Appeals then proceeded to nar-

rate certain testimony which favored Phillips and was apparently considered by the Court as being undisputed. However, the evidence was disputed and, when viewed in the light most favorable to Joe Gibson, would show that the barrels used by Gibson throughout the job were furnished by Phillips employees; that Joe Gibson thought that the barrel which exploded was the same barrel which had been furnished by a Phillips employee the day before; that Gibson could not necessarily have determined the contents of the barrel had he smelled them; and Joe Gibson did not procure the drum, but merely used the drum which had been furnished him the day before. Under these facts the jury was certainly justified in finding that Gibson was not guilty of contributory negligence and that Phillips failed to furnish him a safe place in which to do his work.

These facts certainly present a situation in which this Honorable Court has on numerous occasions granted Writs of Certiorari, for the Court certainly invaded the province of the jury when it saw fit to substitute its own conclusions for that of the jury upon disputed facts. *E. G., Ives v. Grand Trunk R. Co., 63 S. Ct. 1077, 319 U. S. 372,* and *Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608.*

3. The questions here presented have great importance and far reaching effect.

Not only in the State of Texas, but in many other states, there are many, many thousands of individuals performing work for foreign employers, both individuals, firms and corporations. Of these numbers, a great number will un-

doubtedly be injured on premises occupied by the persons, firms, or corporations for whom they are laboring. Certainly, these individuals have the right to have the questions concerning liability for their injuries determined in accordance with the substantive law of the State in which they are working. They should not be subjected to the caprice of a Court of Appeals in connection with which the Court of Appeals is allowed to apply whatever rule it sees fit, regardless of the rule of the State forum, in determining the liability for such injuries.

This is particularly true at present in the State of Texas if the decision of the Court of Appeals is allowed to stand. If an individual is injured by the neglect of a foreign individual, firm, or corporation, then liability will be determined by one set of rules as decreed by the Court of Appeals, whereas if the negligence were attributable to a Texas individual, firm or corporation, the liability would be determined by still another set of rules as decreed by the Supreme Court of Texas. This situation is of such great importance that it should not be allowed to stand.

4. The decision of the Court of Appeals was clearly erroneous.

As is evident from the discussion of the foregoing reasons, the decision of the Court of Appeals was clearly erroneous, since the jury's findings that Phillips Petroleum Company failed to furnish Joe Gibson a safe place to work and that Joe Gibson was not guilty of contributory negligence were clearly supported by the evidence. Further,

under the evidence and the law of the State of Texas, the District Court correctly submitted such issues to the jury in its charge.

Therefore, for this reason alone, this Honorable Court should grant Petitioner's Petition for Certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,653

PHILLIPS PETROLEUM COMPANY,
Appellant,

versus

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY, Intervenor,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(April 19, 1956.)

Before BORAH, TUTTLE and JONES, Circuit Judges.

BORAH, Circuit Judge: Joe Gibson brought this suit against Phillips Petroleum Company, seeking damages for personal injuries sustained by him as the result of the explosion of a kerosene drum upon which he was standing while welding on Phillips' premises. Thereafter, Traders & General Insurance Company intervened, adopting the

pleadings of plaintiff.[1] In his complaint Gibson alleged that the defendant was guilty of negligence which approximately caused his injury. More specifically it was alleged that the defendant failed: (1) to furnish plaintiff with a reasonably safe place in which to do his work and with reasonably safe equipment; (2) to keep a proper lookout for the plaintiff; (3) to make reasonable inspection of the drum in question and to clean said drum and remove the fumes before furnishing it to plaintiff; (4) to tell the plaintiff that the drum in question contained explosive fumes; and (5) to warn plaintiff of the unsafe condition of the drum and of the unsafe condition of its premises.

At the trial the court charged the jury that if plaintiff knew or should have known of the dangers and risks to which he submitted himself, or if he failed to exercise ordinary care for his own safety, or if the injury was brought about by transitory conditions which arose during the progress of the work, or if plaintiff was guilty of contributory negligence, defendant would not be liable. But on the other hand, if the jury found that the defendant had negligently failed to provide plaintiff, a business invitee, with a safe place to work, and that such negligence proximately caused plaintiff's injury, defendant would be liable. The jury under the general charge of the court returned a verdict in favor of the plaintiff in the amount of $40,000, and this appeal is from the judgment which was entered thereon.

[1]Intervenor, the insurer of Grady Bars, welding contractor the employer of plaintiff, sought to recoup workmen's compensation payments made to plaintiff and attorney fees.

Appellant's principal assignments of error relate to the failure of the trial court to grant its motion for directed verdict and its motion for judgment n.o.v. In support thereof it is urged that appellant breached no duty owed by it to Gibson, in that it was under no duty to keep him from doing that which he knew better than to do nor was it under a duty to guard him against the hazards which he created; that Gibson voluntarily exposed himself to the dangers with which he became involved; that there was no evidence to show that the place of work was a proximate cause of his accident; that the whole of the evidence established that the accident occurred because of Gibson's own acts; and that Gibson was guilty of contributory negligence as a matter of law in that he exercised no degree of care whatever for his own safety. These assignments thus present two principal questions: first, whether appellant breached any duty owed to Gibson, and secondly, whether as a matter of law Gibson's injury proximately resulted from his contributory negligence.

On review of a case such as this, there are several considerations which must be kept in mind. It is well settled law that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that negligence and proximate cause are questions of fact to be properly submitted to and determined by jurors from a consideration of all the attending facts and circumstances. On a motion for a directed verdict, as well as on motion for judgment n.o.v., it is the duty of the court to accept as true all the facts which the evidence tends to

prove, and draw against the party making the motion all reasonable inferences most favorable to the party opposing the motion, and if the evidence is of such a character that reasonable men in an impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury. *Swift & Co. v. Morgan & Sturdivant, 5 Cir., 214 F. 2d 115, 116.*

The evidence viewed in the light most favorable to appellee Gibson is as follows: In February, 1952, appellant, acting through its rig supervisor Cecil Parsons, and one Grady Bars, a welding contractor, entered into an oral contract, under the terms of which it was agreed that Bars was to convert a "mud house,"[2] into a "dog house,"[3] and then install it on appellant's active drilling rig No. 28. It was mutually agreed that appellant was to supply the needed steel and that Bars was to furnish the workmen, welding equipment and all things except the materials which were needed to do the work. At the time the contract was entered into no mention was made as to who was to furnish scaffolding or equipment upon which to stand when overhead welding work required such equipment. But anticipating that metal drums might be used for that purpose, Parsons as a precautionary measure ordered his employees to move all of the empty gasoline and kerosene drums away from the drilling rig and the site of the "dog house."

[2]A steel house, 28x7x7½ feet, used for storing drilling mud.
[3]A clothes-changing house for the driller.

When work under the contract began, Bars assigned Gibson to work with him on the conversion of the "dog house." Gibson, a former oil field worker, was an experienced welder and, among other jobs, had done welding work around oil rigs and in a high octane gasoline plant. The conversion work was started at one lease location, but before its completion, the "dog house" was moved to a flat piece of ground on or adjacent to the large caliche covered area on which rig No. 28 was located. By estimated measurement the "dog house" was placed 150 feet southwest of the rig and it was conceded at the trial that its placement at this point did not make Gibson's work either hazardous or dangerous.

At the first location where a part of the conversion work was performed, Bars furnished four or five metal water barrels or drums on which to stand while welding overhead. These "bent up" drums, which had originally been used as oil drums, had been picked up by Bars in January, 1952, on a previous welding job. And when the "dog house" was moved Bars carried these drums in his truck to the new location where they were used for the purpose aforementioned during the first few days of work.

On the morning of February 7, 1952, which was the day immediately preceding the accident, Gibson performed welding work on both the inside and outside of the "dog house." The work which he did on the outside was overhead work on the new doors which had been cut in the north and south sides of the structure. Gibson testified that "Red" Koonz, one of appellant's employees whose

services when needed had been made available to him, had that day procured a drum on which he stood while working overhead; and that upon completion of this work he left the drum on the north side of the house where he had been working. It further appears from the uncontradicted evidence that at least two of Bars' water barrels had on that day been left in place on the west side and about 2½ feet away from the "dog house."

On the afternoon of the same day, Gibson did some work on the derrick in connection with the installation of the "dog house," and on that occasion, he procured a drum from Koonz and stood on it while working overhead. At the close of the day, the drum on which he had stood that afternoon was left under the derrick floor which was approximately 150 feet away from the "dog house."

On the following morning, the day of the accident, Gibson and Bars arrived at the job site in separate trucks. They knew that an overhead pipe was to be cut out of the "dog house" before it was lifted into place on the derrick and each "unrolled" his electric welding equipment preparatory to going to work. Bars intended to do this "two or three minute" job alone, and had placed a 5-gallon bucket on the porch at the north doorway on which to stand while doing the work. But having forgotten his welding goggles he returned to his truck to get them. Gibson, unaware of Bars' intentions, concluded that he would do the work, but found the bucket too low for his use. Whereupon he stepped off the porch and walked eight or ten feet toward the der-

rick where he found a 55-gallon metal drum which, unknown to him, had last contained kerosene. He carried this drum to the porch of the "dog house," stepped upon it with the aid of the bucket and began cutting out the pipe with his electric welder. Thereupon, sparks or flame from the falling slag or metal which he was cutting ignited the fumes from the empty drum and a violent explosion occurred which resulted in the injuries complained of.

The drum which exploded was the property of Johnson Brothers, the oil jobbers who furnished the motor oil, gasoline and kerosene which appellant used in connection with its operations at the drilling rig. Gibson testified that he did not think that the drum was one of the water barrels which Bars had originally provided, or that it was the drum which had been provided by Koonz for the work which he had done on the derrick. But on the contrary, he thought that the drum which he picked up was the same one on which he had stood while working on the "dog house" the previous day, although he frankly admitted that it was three or four feet away from the place where he thought he had left a drum on the preceding day.

The evidence in this record is all one way and to the effect that Gibson knew that petroleum fuels were required for the drilling of the nearby well; that such fuels would be transported to the location in drums; that it was to be expected that empty fuel drums would be around active drilling rigs; that these drums would be empties for gasoline, kerosene and motor oil; that "empty" drums were more likely to have fumes in them than full ones; that the

fact that they were "empty" would make them all the more dangerous; and that it would be dangerous to have a flame around an oil, kerosene or gasoline drum. Despite this knowledge and under the circumstance which we have detailed above Gibson testified that he picked up a drum which looked like the one he had used the day preceding the accident but that he did not exercise his sense of smell to determine its former contents; nor did he examine the drum to ascertain whether the two-inch and one-inch openings which were located on one end of the drum were open or closed, but that he simply set the drum in place for use with the "bung holes" down.

Thus, it is clear from the evidence that Gibson alone procured the kerosene drum, and that no employee of appellant directed him to it or suggested its use. Indeed, no employee of appellant had on that day visited the scene of the accident prior to its occurrence.

Under Texas law, by which we are bound, the burden was on Gibson to prove his case. To discharge that burden it was necessary that he adduce evidence showing not only that appellant was negligent in the sense that he created or maintained a condition on the premises giving rise to an unreasonable risk of injury to persons thereon, but also that as to the class of persons to which Gibson belonged there was a breach of duty. It follows that we must first determine whether in this case there was evidence to support a finding of a breach of duty by the appellant before we reach the other questions presented by the defenses of voluntary exposure to risk and contributory negligence.

In our approach to the immediate problem at hand, we have read numerous Texas cases, such as *Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S. W. 2d 625, 628*, wherein the courts have had occasion to consider whether a landowner was liable to an invitee for injuries sustained on the premises, and we have noted that in speaking of the duty of an owner or occupier of land, the courts have frequently said that the duty is "to use ordinary care to keep the premises in a reasonably safe condition so that the person invited will not be injured." "But," as was pointed out in *McKee, General Contractor v. Patterson, 271 S. W. 2d 391, 393*, that phraseology "is only a simplified statement of the duty sufficient to meet the problems presented in the particular cases," and this statement is subject to certain qualifications not therein expressed in that it is now well established in Texas that the duty of the owner or occupier of land "does not extend to those invitees who know or should know of the existence of the particular condition and who appreciate or should appreciate its dangers * * *. What the qualification means, of course, is that inasmuch as the invitee has knowledge of the dangers there is no duty on the owner to warn him of them. It means also that if, having knowledge of the dangers, the invitee exposes himself to them he must take the premises as he finds them and there is no duty on the owner to protect him even by the use of reasonable precautitons to eliminate the hazards."

Accordingly, in order to fasten liability on the owner or occupier of land, it must first be established that he knew

or should have known of the existence of the condition and that he should have appreciated its dangers. Once this is established, it is necessary to determine what was known and appreciated, or should have been fully realized and appreciated by the invitee. In some cases, the existence of the condition may be so open and obvious and the dangers in it so apparent that the court may say *as a matter of law* that the invitee should have known of and appreciated them. *McKee, General Contractor v. Patterson*, supra, *United Gas Corp. v. Crawford, 172 S. W. 2d 297; Beeville Cotton Oil Co. v. Sells, 84 S. W. 2d 575.* But in others, whether the condition was such that the invitee should have known of its dangers may present a fact question for the jury. *Crow v. Continental Oil Co., 115 F. 2d 740; Smith v. Henger, 226 S. W. 2d 425; McAfee v. Travis Gas Corp., 153 S. W. 2d 442.*

In the case at bar, the evidence clearly shows that appellant was cognizant of the dangerous condition. Indeed, it took affirmative steps to remove the gasoline and kerosene drums from the immediate vicinity of the work place so that they would not be used in connection with the welding operations. Likewise, Gibson's own testimony, by which he is bound, clearly established that he was also aware of the danger involved in using drums which might be found on the premises of an active drilling rig and that he fully appreciated the danger of using a cutting torch around a drum which had had either gasoline or kerosene in it, and yet he picked up a drum on the premises, concededly not in the identical place where he had previously left a drum, and

used it without any examination whatever to determine its former contents and without even observing whether the openings therein were closed. The issue here, then, is narrowed to this: when both Gibson and appellant were fully aware of these dangers, did appellant breach any duty it owed to Gibson? The qualification, above noted, to the general rule of duty to use ordinary care to protect invitees from injuries resulting from unsafe conditions, exists only when the invitee, confronted with the existence of a condition of which he knows and containing dangers which he appreciates, voluntarily encounters them. We hold that Gibson here made such a choice, voluntarily encountering the danger, and consequently, under Texas law, appellant breached no duty to him.

Moreover, the evidence which we have detailed above establishes as a matter of law that Gibson's own negligence was the sole proximate cause of his injury. It is a well-established rule of law that a duty rests upon everyone to exercise his intelligence to the fullest extent and to make such use of his external senses in the interest of his own safety as is reasonable under the circumstances and one injured as a result of his failure to use his faculties to observe and discover a danger which would have been observed and discovered by an ordinarily prudent person is guilty of contributory negligence. *United States Gypsum Co. v. Balfanz, 5 Cir., 193 F. 2d 1, 4.* If Gibson had taken some precaution and care for his own safety, it would have been for the jury to determine whether he had exercised such care as an ordinary prudent person would have exer-

cised under like or similar circumstances to avoid receiving the injury. But here it is clear that he took no care whatsoever. Consequently, the matter was not for submission to the jury but should have been disposed of by the court by an instructed verdict.

It was error to refuse to direct a verdict for appellant and because of that error, the judgment of the District Court is reversed and judgment is here rendered for appellant.

REVERSED AND RENDERED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B

JUDGMENT

Extract from the Minutes of April 19th, 1956.

No. 15653

No. 15,653

PHILLIPS PETROLEUM COMPANY,

versus

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY, Intervenor.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and judgment is here rendered for appellant, Phillips Petroleum Company;

It is further ordered and adjudged that the appellees, Joe Gibson and Traders and General Insurance Company, Intervenor, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

ORDER DENYING HEARING

Extract from the Minutes of May 23rd, 1956.

PHILLIPS PETROLEUM COMPANY,

versus

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY, Intervenor.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Office - Supreme Court, U.S.
FILED
AUG 21 1956
JOHN T. FEY, Clerk

No. 339

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,653

PHILLIPS PETROLEUM COMPANY,

Appellant,

v.

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY,

Appellees.

Appeal from the District Court of the United States, for the Western District of Texas, Pecos Division

APPELLEES' PETITION FOR A REHEARING AND MOTION FOR PERMISSION TO FILE ARGUMENT IN SUPPORT THEREOF

U. S. COURT OF APPEALS
FILED
MAY 10 1956
JOHN A. FLEHAN, JR.
CLERK

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INDEX

	Page
Appellees' Petition for Rehearing	1-5
Appellees' Motion for Leave to File Argument in Support of Its Petition for Rehearing:	
Statement	8-16
Argument and Authorities	16-24
Prayer	24
Certificate	25

Page

Alma Schulz, Administratrix of the Estate of August M. Schulz v. The Pennsylvania Railroad Company, ... U. S. (April 9, 1956), Certiorari granted 350 U. S. 882 21-24

McKee, General Contractor v. Patterson, 271 S. W. 2d 391 (Supreme Court of Texas) 16, 17

Sun Oil Company v. Pierce, 224 Federal 2d 580 16

U. S. Gypsum Company v. Balfanz, 193 Federal 1 17

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JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY,
Appellees.

Appealed from the United States District Court for the Western Division of Texas, Pecos Division

---

APPELLEES' PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Fifth Circuit:

Now come Appellees, Joe Gibson and Traders and General Insurance Company, and file this their Petition for a Rehearing and respectfully move this Honorable Court to set aside and vacate the decision heretofore made and Judgment heretofore entered on April 19, 1956, in the

above entitled and numbered cause, and to grant them a rehearing, and as grounds therefor assign error as follows:

1.

Although professing to view the evidence in the light most favorable to Appellees and to draw against Appellant all reasonable inferences most favorable to Appellees, this Honorable Court erred in erroneously viewing the evidence in the light most favorable to the Appellant and drawing in favor of Appellant all inferences most favorable to Appellant; for when properly viewed, the evidence as found by the trial court and jury showed that Appellee Gibson did not know, nor should he have known, of the dangers existent by reason of the former contents of the barrel which exploded and further showed Appellee, Gibson, exercised sufficient care for his own safety to avoid being chargeable with contributory negligence.

2.

This Honorable Court erred in finding that Appellee Gibson alone procured a kerosene drum and that no employee of Appellant directed Gibson to it or suggested its use, for the evidence showed that Appellant's employee, Koonz, had furnished to Gibson this particular drum which exploded on the day preceding the explosion and that therefore Gibson did not himself procure the barrel but was merely using the barrel furnished by Appellant for Gibson's use.

3.

This Honorable Court erred in finding that Gibson exercised no precaution or care for his own safety, since he had inquired as to the contents of the barrels furnished by Appellant and had been told they contained water; the barrel that exploded had the same appearance as those furnished by Appellant to Gibson; and the barrel that exploded had been furnished by Appellant to Gibson and was used by Gibson the day before.

4.

This Honorable Court erred in holding that since Gibson had general knowledge of the conditions existing around a drilling operation including the usual existence of kerosene barrels on the premises, then by virtue of such general knowledge Gibson knew that the barrel which exploded was dangerous and Gibson voluntarily encountered such danger when the evidence showed to the contrary that Gibson did not know, nor should he have known, of the dangerous condition of the particular barrel which exploded.

5.

This Honorable Court erred in applying the rule that an invitee is owed no duty with reference to a dangerous condition which the invitee knows or should have known, since this rule applies only to an open and obvious danger which the condition of the barrel was not, for otherwise an invitee has the right to assume that the premises are safe for his use.

6.

This Honorable Court erred in holding that "a duty rests upon everyone to exercise his intelligence to the fullest extent and to make such use of his external senses in the interest of his own safety as is reasonable under the circumstances and one injured as a result of his failure to use his faculties to observe and discover a danger which would have been observed and discovered by an ordinarily prudent person is guilty of contributory negligence," since this is not the law of Texas as set forth by the Supreme Court of Texas and approved by this Honorable Court and further since there is no showing that Gibson could have determined the former contents of the barrel had he made a minute sensory inspection.

7.

This Honorable Court erred in reversing and rendering this case on the basis that the case should not have been submitted to the jury and that Appellant's Motion for Instructed Verdict should have been granted for the reasons set out in the above assigned errors.

WHEREFORE, Appellees' pray that this Petition for Rehearing be granted and that the Judgment heretofore entered by this Honorable Court on April 19, 1956, reversing the Judgment of the Trial Court and rendering Judgment for Appellant be set aside and that the Judgment of the Trial Court be affirmed inasmuch as Appellees' respect-

fully contend that a gross miscarriage of justice would otherwise result as is hereinabove set out.

Respectfully submitted,

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By: .....
Attorneys for Appellees.

Henry D. Akin, Jr., Counsel of Record for Appellees' in the above entitled and numbered cause, does hereby certify that the above and foregoing Petition of Appellees for a Rehearing of said cause is filed in good faith and not for delay and is believed by him to be meritorious.

Served on Appellant, Phillips Petroleum Company, by mailing copies thereof to Rayburn L. Foster, Esquire, Bartlesville, Oklahoma, and Carl W. Jones, Esquire, Box 791, Midland, Texas, and Raymond A. Lynch, Esquire, Box 913, Midland, Texas, and Harry D. Turner, Esquire, Bartlesville, Oklahoma, and Layton A. Webb, Esquire, Box 791, Midland, Texas, and William L. Kerr, Esquire, Turpin, Kerr & Smith, Box 913, Midland, Texas.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,653

PHILLIPS PETROLEUM COMPANY,

Appellant,

v.

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY,

Appellees.

Appeal from the District Court of the United States, for the Western District of Texas, Pecos Division

---

APPELLEES' MOTION FOR LEAVE TO FILE ARGUMENT IN SUPPORT OF ITS PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Fifth Circuit:

Now come Joe Gibson and Traders & General Insurance Company, Appellees in the above entitled and numbered cause, by their attorneys and respectfully move the Court

for leave to file the following argument in support of their Petition for Rehearing, to-wit:

STATEMENT

Part of the evidence relied upon by Appellees' which conclusively establish liability on the part of Appellant and upon which evidence the jury reached its verdict in favor of Appellees, and upon which evidence the Trial Court rendered its Judgment, and upon which evidence this Honorable Court should affirm the Trial Court Judgment, is as follows:

Appellee Gibson testified as follows on Direct Examination:

Page 33 of the record:

"Q. When you were first furnished that drum as a platform to work on did you make any inquiry about what had been its contents previous to its being used as a platform to work on?

"A. Yes, sir.

"Q. Who did you ask?

"A. I asked two boys who were standing there.

"Q. Were they Phillips men?

"A. Yes, sir.

"Q. What did they say?

"A. They said it was water drums.

"Q. Were there any other drums around there in the Phillips location?

"A. I didn't notice any, no, sir.

"Q. Did you continue to use the drums they had furnished you as long as you worked there during this conversion job?"

Page 34 of the Record:

"A. Yes, sir. We moved them. They moved them in the doghouse. They put them in the doghouse and moved them in the other rig when they moved the rig.

"Q. Did all the drums have the same appearance?

"A. Yes, sir.

"Q. Any identifying marks on them at all?

"A. Not as I saw them, no, sir.

"Q. Did the Phillips men work with you when you were using the drums as a platform to work on?

"A. Yes, sir."

Page 36 of the Record:

"Q. Had you done any work on it at all on February 7th?

"A. Yes, sir.

"Q. What work had you done?

"A. Well, I had welded up, I had built some closets for the boys to hang their clothes in.

"Q. Inside?

"A. Yes, sir, inside. And, I don't know. I didn't do all of it that day, but I was working on that, and then they got a long tool box on one side that they put their tools in, and then another little box that I was working on.

"Q. Well, you built all of that inside of the dog house?

"A. Yes, sir.

"Q. According to Mr. Partsons' specifications?

"A. Yes, sir.

"Q. Did any (sic) Phillips' men work with you on the dog house that day, February 7th?

"A. Yes, sir.

"Q. Was it necessary to do any work overhead that you couldn't reach standing?

"A. Yes, sir.

"Q. Were you furnished any kind of a platform to stand on that day?

"A. Yes, sir.

"Q. What?

"A. A Drum.

"Q. By whom, one of the roughnecks?"

Page 37 of the Record:

"A. Yes, sir.

"Q. Do you know which one?

"A. That little 'red' fellow.

"Q. The red-headed boy, the one that was working with you on the 7th?

"A. Yes, sir.

"Q. Now what kind of a drum?

"A. It was just a drum.

"Q. What size?

"A. A fifty-five gallon.

"Q. It had the same appearance as the other ones that you had worked on?

"A. Yes, sir.

"Q. Was there any board on the drum that day or was it a single drum?

"A. It was a single drum, yes, sir.

"Q. Was Mr. Bars out there on the 7th, your employer?

"A. No, sir, not that I can recall.

"Q. Pardon me?

"A. Not that I can recall. I don't think he was out there at all.

"Q. Were you or not the only employee of Mr. Bars working on that conversion job on February 7th?

"A. Yes, sir.

"Q. Did he have any other employees working for him anywhere?

"A. No, sir.

"Q. Now did you leave the job on the 7th and come back on the 8th?

"A. Yes, sir.

"Q. When you left the job was the drum that you had been using left there?

"A. Yes, sir.

"Q. Where was it left? I mean, the one that you were using on the doghouse, where was it left?"

Page 38 of the Record:

"A. Right where I had been using it by the side of the doghouse.

"Q. Where did you begin working when you got there on the morning of February 8th?

"A. Well, Cecil had told me, Mr. Parsons had told me that he wanted some conduit pipe cut out of the top.

"Q. Of the dog house?

"A. Yes, sir. And I had started cutting on it.

"Q. He told you what he wanted cut, but did he ever tell you how he wanted it cut?

"A. No, sir.

"Q. And did you start to do that?

"A. Yes, sir.

"Q. Could you reach that?

"A. No, sir.

"Q. Was the drum available?

"A. Yes, sir.

"Q. Did you get it?

"A. Yes, sir.

"Q. Was it in the same place you had left it?

"A. Yes, sir. Close to it, probably, it might have been three or four feet from where I thought I left it.

Page 39 of the Record:

"Q. Did it look like the same drum you had used the day before?

"A. Yes, sir.

"Q. Did you have anything to do at all with the selection of the drum to stand on?

"A. No sir."

Page 42 of the Record:

"Q. Was there any markings on the drum to warn you of what it had in it, such as writing on it or stenciling?

"A. No, sir."

On Cross Examination, Appellee, Gibson, testified as follows on page 103 of the Record:

"Q. I see. Now, as to the barrel or drum that you used, did you make any examination of it at all to

determine whether the holes were closed on the open end?

"A. No, sir.

"Q. Well, you are not telling the jury whether it was either open or closed?

"A. No, sir.

"Q. You don't know?

"A. No, sir.

"Q. Now, you could have very easily looked and seen about that, couldn't you?"

Page 104 of the Record:

"A. Yes, sir, but I thought it was the drum that I had been using. I didn't think it was necessary.

"Q. But my question was you could have easily looked to tell, couldn't you?

"A. Yes, sir.

"Q. And you didn't look?

"A. No, sir.

"Q. And you didn't try to look?

"A. No, sir.

"Q. Now, had the drum been opened you could have smelled to see what kind of a product had been in there, couldn't you?

"A. Not necessarily, no, sir.

"Q. You mean that you can't sniff a barrel and tell whether it is an oil barrel or a kerosene barrel or a gasoline barrel?

"A. It is hard to do, sir."

On Re-Direct Examination Appellee, Gibson, testified as follows on page 114 of the Record:

"Q. Had the drum—strike that. Had you used a drum on the doghouse the day before?

"A. Yes, sir.

"Q. Who got the drum for you the day before?

"A. It was one of those Phillips boys.

"Q. And the drum that you used on the 8th, did it look like, exactly like the drum you had used the day before?

"A. Yes, sir.

"Q. Had anything happened while you were on the drum the day before, any danger of explosion or anything?

"A. No, sir.

"Q. Did you know that this drum on which you were standing February 8th had fumes in it?

"A. No, sir.

"Q. Did you ever have anything to do with the handling of those drums or emptying the contents from the drums into any supply bins that Phillips had?

"A. No, sir.

"Q. Who did that?

"A. The Phillips hands.

"Q. Now, Mr. Kerr asked you whether or not there was any danger there or had been. I will ask you if the drum had not contained explosive fumes whether or not there would have been any danger on earth in you using a cutting torch on that pipe?

"A. There was not, sir."

In order to give this Honorable Court an example of Appellant's evidence, Appellees would respectfully show that Appellant's driller, T. J. Murray, testified in part as follows, page 169:

"Q. All the same kind of drums from outward appearances?

"A. Yes, sir.

"Q. Any identifying marks on them?

"A. No, sir.

"Q. Mr. Gibson had been working out there for several days before this happened, had he not?

"A. Yes, sir, as well as I remember, around four or five days, maybe a week.

"Q. What kind of work had he been doing?

"A. Welding.

"Q. Welding what?

"A. He was welding on this doghouse, remodeling it.

"Q. Did he also do some cutting on the rig floor there, to have a place to put the converted doghouse when it was completed?

"A. Yes, sir.

"Q. What was furnished him to stand on when he had to weld or cut above his head?

"A. We furnished him an oil drum.

"Q. And that was one just like the one that blew up?

"A. It was the same thing, yes, sir."

Page 170:

"Q. What did you all help him do?

"A. Well, get him something to stand on, or they might hold a piece of metal while he welded it or cut if off, where it wouldn't fall, something like that."

Page 171:

"Q. Now where did you get the oil drum that was furnished the welder when he had to stand on it? Was it from the stack out there?

"A. Yes, sir.

"Q. Did you yourself get it from him or have one of the roughnecks?

"A. Had one of the roughnecks."

Pages 174 and 175:

"Q. You, yourself, Mr. Murray, didn't ever go to the trouble of telling Mr. Bars which stack was which because you always got the barrel for him, didn't you?

"A. Yes, sir.

"Q. And I suppose that it would also be true that you never did tell Mr. Bars' employee, such as Mr. Gibson or whatever welder he had out there, which stack was which because if he needed one, you would go get it for him?

"A. Yes, sir."

ARGUMENT AND AUTHORITIES

Without question the Texas law as set forth in *McKee, General Contractor v. Patterson, 271 S. W. 2d 391 (Supreme Court of Texas)*, which case was cited with approval by this Honorable Court in the case of *Sun Oil Company v. Pierce, 224 Federal 2d 580*, should be controlling here. In the *Pierce* case this Honorable Court held as follows:

"We recognize the law in Texas to be as stated in Robert E. McKee, General Contractor v. Patterson, Tex. 271 S. W. 2d 391-393, that the duty owed by a general contractor to employees of a sub-contractor is similar to that owed by an owner or occupier of land to his invitees, and does not extend to those persons who or should know of the existence of a particular condition, and who appreciates or should appreciate its dangers. The same knowledge and appreciation of danger on the part of the employee of the sub-contractor, which negatives any initial duty

owed to him by the general contractor, may also be the basis of the affirmative defenses of voluntary exposure to risk and contributory negligence.

The Texas Supreme Court held further as follows in the *McKee* case, to wit:

> "In all such cases, knowledge of the existence of the condition and appreciation of the danger therein by the parties are important factors in determining liability, but the rule for determining whether the parties should have known of the condition and appreciated its dangers is not always the same as to each. *The owner is charged with knowledge of any dangerous condition that a reasonable inspection would reveal because his duty to keep his premises in a reasonably safe condition for use by his invitees includes a duty to inspect.* Smith v. Henger, Supra; R. E. Cox Dry Goods Co. v. Kellog, Tex. Civ. App., 145 S. W. 2d 675, writ refused. *There is no such obligation on the invitee.* Peck v. Peck, 99 Tex. 10, 87 S. W. 248; Triangle Motors of Dallas v. Richmond, Texas, 258 S. W. 2d 60, 63. *While he may not close his eyes to obvious dangers, he has a right to assume that the premises are safe for his use.* Blanks v. Southland Hotel, Inc., 149 Tex. 139, 229 S. W. 2d 357, 360; Triangle Motors of Dallas v. Richmond, supra; Restatement of Torts, Vol. 2, Secs. 343a and 343d." (Italics added.)

The holding in the case of the *U. S. Gypsum Company v. Balfanz, 193 Federal 1,* conflicts somewhat with the law as above declared by the Texas Supreme Court as being the Texas law, and the Texas law should certainly control here. The Court in the *Balfanz* case did hold that an invitee must use his external senses to discover any existing dangerous conditions with the Court basing this holding not on

a Texas, but upon a Missouri case. Thus, this is not the law in Texas but, to the contrary, the law of Texas is declared by the Supreme Court of Texas, that an invitee "may not close his eyes to obvious dangers," but, "he has the right to assume that the premises are safe for his use and he does not have any obligation to make an inspection to determine the safety of the premises."

When the Texas law is applied to the evidence as above set forth, the conclusion is inescapable that this Honorable Court erred in holding that the Trial Court should have granted Appellant's Motion for Instructed Verdict. Appellant's employee on the day preceding the explosion in question furnished Gibson with a barrel upon which to stand while doing welding and cutting work on the "doghouse"; previously Gibson had inquired as to the former contents of the barrel furnished to him by Appellant's employee, and he was told that they contained water; the drum furnished Gibson the day before the explosion had the same appearance as the others furnished him, and none of the barrels had any markings or other distinguishing characteristics to their former contents; Gibson further testified that he could not have necessarily determined the former contents of the barrel by smelling it because it was very hard to do.

On the morning of the explosion Gibson picked up what he believed to be the same barrel furnished him the day before by Appellant's employee for the use in welding and cutting on the doghouse. Obviously, Gibson did not know

of the dangerous condition of this particular barrel which is the thing in question, not the condition of other barrels which might be found around the drilling premises. Under the Texas law Appellant would be relieved from its duty to furnish Gibson with a safe place to work by virtue of Gibson voluntarily encountering such danger only if Gibson knew of the dangerous condition of the barrel, which he did not, or should have known of the dangerous condition. Further, under the Texas law Gibson should have known the dangerous condition of the barrel only if the dangers were open and obvious. Particularly in view of the barrels having been furnished by Appellant through its employee, its having the same appearance as those which Gibson had been told were water barrels, its having no markings to indicate its former contents and its having contained a substance which Gibson could not have recognized by smell (Gibson could not have even smelled the contents without having had to do some work on the barrel in removing the bungs); Gibson certainly should not have known of the dangerous contents of the barrel since such dangerous condition was not open and obvious but extremely latent and concealed. In this connection Appellant again respectfully points out that under the Texas law Gibson was under no duty to make an inspection of the barrel and had the right to assume that the premises were safe for his use; therefore, since Gibson did not voluntarily expose himself to a danger which was known or should have been known to him, there was nothing to relieve Appellant's breach of its duty to furnish Gibson a safe place in which to work. This Honorable Court erred in holding to the contrary.

For essentially the same injuries the jury was supported in its findings that Gibson was not guilty of contributory negligence as stated by this Honorable Court; the inquiry is whether or not Gibson exercised any care or precaution for his own safety. Under the evidence as above presented most certainly he did from the very start of the job. When Appellant's employee first furnished barrels for Gibson to stand on, Gibson inquired and was told that the barrels furnished were water barrels. On the day preceding the explosion Appellant's employee furnished Gibson with a barrel which from all appearances was a barrel just like the ones he was told were water barrels, and on that date he used the barrel in complete safety. On the morning of the explosion Gibson started to do some work which he had been instructed to do the evening before by Appellant's tool pusher, Mr. Parsons. Gibson found he needed to elevate himself to do this work. Logically he used the barrel which had been furnished by Appellant's employee the day before for such use, which barrel had the same appearance as the water barrels furnished him and which had been used in safety the day before. Therefore, Gibson did exercise care and precaution for his own safety and the jury was fully justified in finding that Gibson was not contributorily negligent, and this Honorable Court erred in holding that this matter should have been disposed of by instructed verdict.

An extremely serious question is raised when a Court determines that a case should not be submitted to the jury and that an instructed verdict should be granted. The

Supreme Court of the United States realizes this to the fullest extent, and in a very recent opinion the Supreme Court discussed the question fully. In fact the Supreme Court felt so keenly about the matter that it distributed to each of the United States District Courts a copy of the opinion in advance of its publication. This opinion was handed down in the case of *Alma Schulz, Administratrix of the Estate of August M. Schulz v. The Pennsylvania Railroad Company, U. S. (April 9, 1956), Certiorari granted 350 U. S. 882.* The facts of the *Schulz* case are that Petitioner's husband, while employed by the railroad as a tug fireman, was drowned with the alleged cause being the negligent failure of the railroad to provide him with a safe place to work.

In this connection the Supreme Court stated as follows:

> "While some facts were in dispute there was evidence from which a jury could have found: On Christmas Day, 1949, at about 5:15 P. M. the deceased, Schulz, reported for work on his job at Pier H, Jersey City, New Jersey, and was assigned to work on four tugboats docked side by side there. He went immediately to check the boats without waiting to change from his street to his working clothes. Returning to the pier alongside the tugs about seven o'clock, Schulz reported that he had finished his checking and was now going back to the boats to change to his work clothes and proceed with his other duties there. He was last seen alive walking in the direction of the nearest tug at 1:25 a.m., a supervisor found Schulz was not on the boats. His street clothes were hanging in the upper engine room where the tug attendants usually changed clothes. His lunch package was also there. Three of the tugs were at all times wholly unlighted and dark; one was partially illumi-

nated by spot lights from the pier. The night was cold—10 above zero—and there was some ice on the tugs. Because the company did not have enough workers that night properly to perform the duties that were required Schulz had to try to take care of all four tugs by himself. To do this he had to step from one boat to another in the dark except for such limited illumination as he could obtain from a flashlight. Several weeks after Schulz disappeared from the boats his body was found in the water near an adjacent pier. He was clothed in nothing but shorts and socks. A flashlight was in his HAND. He had drowned. It is conceded that the deceased was not under the influence of alcohol when he came to the boat, that he did not commit suicide, that there was no foul play, and that he met his death by accident. The evidence showed that he was a capable and experienced workman who had been employed by the defendant for several years."

Upon this evidence the Trial Court directed the jury to return a verdict for the Defendant. In holding that the Trial Court should have submitted the case to the jury and in reversing the Trial Court's Judgment the Supreme Court held as follows:

"The jury trial 'is part and parcel of the remedy afforded railroad workers under Employers' Liability Act,' which the Jones Act makes applicable to those working as petitioner's husband was here. The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' We granted certiorari to consider the failure of the District Court to let this case go to the jury. 350 U. S. 882.

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind

that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & C. R. Co., 128 U. S. 443, 445 (1888).

"The very essence of its (the jurys') function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Under the evidence presented in the instant case certainly the Trial Court correctly let the case go to the jury and the jury to paraphrase the Supreme Court, reached its "conclusions" on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statement by writs of proof of circumstances from which inferences can generally be drawn to the effect that Appellant breached its duty to Gibson to fur-

nish him a safe place in which to perform his duty proximately causing his injuries which injuries were not contributed to by any negligence on the part of Gibson. Certainly the *Schulz* case is a much weaker case on those facts than the one here presented, and the evidence as presented by the Appellees' more than support Appellants earnest contention that the Trial Court correctly rendered Judgment for Appellees and that this Honorable Court erred in reversing the Trial Court's Judgment and rendered Judgment for the Appellant.

WHEREFORE, Premises Considered, Appellees respectfully pray that they be permitted to file this Argument, and that its Petition for Rehearing be granted and that the Judgment of this Honorable Court be vacated and that the Judgment of the Trial Court be affirmed.

Respectfully submitted,

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CERTIFICATE

A copy of the foregoing brief has been deposited in the United States mail in a properly stamped envelope, addressed to counsel, as follows: Rayburn L. Foster, Esquire, Bartlesville, Oklahoma, and Carl W. Jones, Esquire, Box 791, Midland, Texas, and Raymond A. Lynch, Esquire, Box 913 Midland, Texas, and Harry D. Turner, Esquire, Bartlesville, Oklahoma, and Layton A. Webb, Esquire, Box 791, Midland, Texas, and William L. Kerr, Esquire, Turpin, Kerr & Smith, Box 913, Midland, Texas.